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In the Supreme Court of the United States

OCTOBER TERM, 1997

THE PINAL CREEK GROUP, ET AL., PETITIONERS

v.

NEWMONT MINING CORP., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Whether a private party that is concededly liable for the costs of responding to hazards at a mine site under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. 9601 *et seq.*, may recover response costs from other responsible parties by bringing an action for joint and several liability, rather than for contribution.

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This brief is submitted in response to the Court's order inviting the Solicitor General to express the views of the United States.

STATEMENT

Petitioners are a group of mining companies that are among the entities responsible for creating hazardous conditions in the Pinal Creek Drainage Basin (Pinal Creek Site). Petitioners have undertaken response activities to eliminate those hazards and have commenced this action under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), 42 U.S.C. 9601 *et seq.*, to recover their response costs from respondents, who also contributed to the hazardous condi-

tions at the Site. The United States District Court for the District of Arizona ruled that petitioners may maintain an action against respondents under Section 107 of CERCLA, 42 U.S.C. 9607, for joint and several liability. See Pet. App. 22-59. The court of appeals reviewed that ruling on interlocutory appeal, see 28 U.S.C. 1292(b), and reversed. Pet. App. 1-21. The court of appeals held that petitioners are limited to seeking contribution in accordance with Section 113 of CERCLA, 42 U.S.C. 9613. Pet. App. 20-21.

1. "CERCLA is a comprehensive statute that grants the President broad power to command government agencies and private parties to clean up hazardous waste sites." *Key Tronic Corp.* v. *United States*, 511 U.S. 809, 814 (1994). Section 104 of CERCLA authorizes the President of the United States to respond directly to releases or threatened releases by undertaking "removal" and "remedial" actions in conformity with the National Contingency Plan (NCP), 42 U.S.C. 9604, which includes a National Priorities List (NPL) identifying the sites that pose the most serious need for cleanup, 42 U.S.C. 9605. See 40 C.F.R. Pt. 300 (setting out the NCP and NPL). Section 106 of CERCLA additionally grants the President authority to issue orders and to seek injunctive relief to compel persons to respond to releases or threats of release. 42 U.S.C. 9606.[1]

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[1] The President has delegated most of his authority for administering CERCLA to the Administrator of the Environmental Protection Agency (EPA). Exec. Order No. 12,580, 3 C.F.R. 193 (1988), *reprinted in* 42 U.S.C. 9615 note. The President has also delegated CERCLA response action authorities and responsibilities to the heads of other executive branch agencies with respect to facilities under their jurisdiction, custody, or control. *Ibid.*

CERCLA also provides a mechanism for financing government-initiated cleanups of hazardous waste sites. Upon satisfying statutory conditions, the United States may use the "Hazardous Substance Superfund" as the initial source of funding for federal response actions. See CERCLA §§ 101(11), 104, 42 U.S.C. 9601(11), 9604; 26 U.S.C. 9507. The United States may then bring judicial actions against specifically identified categories of responsible persons (including facility owners and operators and persons who arrange for disposal of, or transport, hazardous substances) to recover the government's costs of response and replenish the Superfund. See CERCLA § 107(a)(4)(A), 42 U.S.C. 9607(a)(4)(A). The States and Indian Tribes may also bring actions under Section 107(a)(4)(A) to recover their costs of response. *Ibid.*

Section 107(a)(4)(B) allows private parties to recover necessary costs of response from the designated categories of responsible parties in certain circumstances; and, in conjunction with Section 113(f)(1), it allows responsible parties to seek contribution from other responsible parties. See 42 U.S.C. 9607(a)(4)(B), 9613(f)(1). Section 107(a)(4)(B) specifically provides that a private party may bring suit against a responsible person to recover "necessary costs of response incurred" that are "consistent with the national contingency plan." 42 U.S.C. 9607(a)(4)(B). Section 113(f)(1), which was added by the Superfund Amendments and Reauthorization Act of 1986 (SARA), Pub. L. No. 99-499, Tit. I, § 113, 100 Stat. 1647, additionally provides that "[a]ny person may seek contribution from any other person who is liable or potentially liable under section 9607(a) of this title, during or following any civil action under section 9606 of this title or under section 9607(a) of

this title." 42 U.S.C. 9613(f)(1). Section 113(f)(1) directs that, in resolving contribution claims, the courts may allocate response costs among the liable parties based on "such equitable factors as the court determines are appropriate." *Ibid.*

2. Petitioners and their predecessors conducted mining operations at the Pinal Creek Site, which is located near the towns of Globe and Miami, Arizona. Those operations produced hazardous substances that have contaminated groundwater in the shallow aquifer underlying Pinal Creek, which is hydrologically connected to Maricopa County's residential water supply. The Arizona Department of Environmental Quality (ADEQ) initiated an investigation of the groundwater contamination, which prompted petitioners, who are concededly responsible parties under CERCLA, to begin State-approved response actions at the Site. Respondents, who are potentially responsible parties (PRPs) under CERCLA, have refused to participate in the cleanup or reimburse the State for its expenses. Pet. App. 3-4, 24-26.

In response, petitioners filed this action, which seeks, among other things, to hold respondents jointly and severally liable under Section 107(a)(4)(B) for the petitioners' response costs at the Site. Pet. App. 3-4, 23-24. Respondents resisted petitioners' claim for joint and several liability through motions for dismissal and judgment on the pleadings. *Id.* at 4, 24 Respondents contended that, because petitioners are themselves liable at the Site, their sole remedy against respondents is an action for contribution, which is specifically provided for in Section 113(f). *Id.* at 31-32. The district court denied respondents' motions, ruling that CERCLA grants a responsible party "standing" to assert a claim for joint and

several liability against other responsible parties at a site. *Id.* at 32.

The district court certified its order for interlocutory appeal under 28 U.S.C. 1292(b). The court of appeals granted the petition and reversed. Pet. App. 1-21. The court of appeals concluded that Section 107(a)(4)(B) of CERCLA allows one jointly responsible party to sue another, but that the specific type of relief in that situation is spelled out in Section 113(f), which provides a right of contribution among jointly responsible parties. *Id.* at 7-8. The court noted that its conclusion is not only consistent with the text and legislative history of CERCLA, but "is consistent with statements by the Supreme Court, and by five other circuits, recognizing in contexts similar to this one, that a CERCLA claim by a PRP against another PRP is necessarily for contribution." *Id.* at 13.[2]

Since the court of appeals' decision, the State of Arizona and petitioners have submitted a proposed consent decree for entry by the same district court in which petitioners' action is pending. See Proposed Consent Decree Between the State of Arizona, the Arizona Department of Environmental Quality, and the Pinal Creek Group in *Arizona ex rel. Rhoades* v. *Cyprus Miami Mining Corp. et al.*, Civ. No. 97-1789 PHX SMM (complaint filed Aug. 22, 1997). The proposed consent decree would resolve petitioners' CERCLA liability to the State with respect to the Site and provide petitioners with protection from contribution suits by other liable parties, including respondents. See *id.* § 37, at 69-70; see generally CERCLA § 113(f)(2), 42 U.S.C. 9613(f)(2).

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[2] The United States participated in the court of appeals as an amicus curiae supporting reversal.

DISCUSSION

The Court should deny the petition for a writ of certiorari because this case does not satisfy any of the normal criteria for this Court's review. The court of appeals' decision, which addresses a narrow question of statutory construction, does not conflict with any decision of another court of appeals or otherwise present a question of exceptional importance warranting this Court's review in the absence of a conflict in the circuits. Furthermore, the court of appeals' decision is correct. This case presents an especially inappropriate occasion for this Court to address the question presented, because petitioners and the State of Arizona have submitted a proposed consent decree to the district court that, as a practical matter, would significantly alter the context in which this Court would decide the legal issues.

1. Every court of appeals that has addressed the question presented has held, as did the court below, that a responsible private party seeking recovery of response costs under CERCLA from another jointly responsible party may sue only for contribution to recover "that portion of its costs that are in excess of its *pro rata* share of aggregate response costs." *United Technologies Corp.* v. *Browning-Ferris Indus., Inc.*, 33 F.3d 96, 103 (1st Cir. 1994), cert. denied, 513 U.S. 1183 (1995).[3] As petitioners acknowl-

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[3] This case involves an action by private parties under Section 107(a)(4)(B) of CERCLA, 42 U.S.C. 9607(a)(4)(B), and not an action by the United States, a State, or an Indian Tribe under Section 107(a)(4)(A), 42 U.S.C. 107(a)(4)(A). Accordingly, no question is presented here concerning the availability of joint and several liability in actions filed under Section 107(a)(4)(A).

edge (Pet. 13-14), those courts of appeals include the First, Third, Seventh, Tenth, and Eleventh Circuits. See, *e.g.*, *United Technologies Corp.*, *supra*; *New Castle County* v. *Halliburton NUS Corp.*, 111 F.3d 1116, 1121-1123 (3d Cir. 1997); *Rumpke of Indiana, Inc.* v. *Cummins Engine Co.*, 107 F.3d 1235, 1239-1242 (7th Cir. 1997); *United States* v. *Colorado & Eastern R.R.*, 50 F.3d 1530, 1534-1536 (10th Cir. 1995); *Redwing Carriers, Inc.* v. *Saraland Apartments*, 94 F.3d 1489, 1496 (11th Cir. 1996).[4]

The uniformity among the courts of appeals is not surprising. Their decisions rest on the familiar general principle, recognized in a variety of judicial and statutory contexts, that jointly responsible parties may obtain an equitable allocation of their common liability through the mechanism of a contribution claim. See, *e.g.*, *Northwest Airlines* v. *Transport Workers Union*, 451 U.S. 77, 87-88 (1981); *In re "Agent Orange" Prod. Liab. Litig.*, 818 F.2d 204, 207 (2d Cir. 1987); Restatement (Second) of Torts § 886A (1979); Uniform Contribution Among Tortfeasors Act (1955) (UCATA), § 1, 12 U.L.A. 194 (1996); Uniform Comparative Fault Act (1977) (UCFA), § 4, 12 U.L.A. 142 (1996); see also *Black's Law Dictionary* 328 (6th ed. 1990) (defining contribution as the

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[4] See also *Sun Co.* v. *Browning-Ferris, Inc.*, 124 F.3d 1187, 1190-1194 (10th Cir. 1997), cert. denied, 118 S.Ct. 1045 (1998); *Bancamerica Commercial Corp.* v. *Mosher Steel*, 100 F.3d 792, 799-800, amended, 103 F.3d 80 (10th Cir. 1996); *Control Data Corp.* v. *S.C.S.C. Corp.*, 53 F.3d 930, 935 (8th Cir. 1995); *Akzo Coatings, Inc.* v. *Aigner Corp.*, 30 F.3d 761, 764 (7th Cir. 1994); *In re Dant & Russell, Inc.*, 951 F.2d 246, 249 (9th Cir. 1991); *Amoco Oil Co.* v. *Borden, Inc.*, 889 F.2d 664, 672 (5th Cir. 1989); *Smith Land & Improvement Corp.* v. *Celotex Corp.*, 851 F.2d 86, 88-89 (3d Cir. 1988), cert. denied, 488 U.S. 1029 (1989).

"[r]ight of one who has discharged a common liability to recover of another also liable, the aliquot portion which he ought to pay or bear").[5]

Although petitioners acknowledge the uniformity of result among the courts of appeals, Pet. 13-14, they assert that the courts have relied on divergent rationales. Mere variations in the analysis or articulation of a governing principle do not give rise, however, to a conflict among the courts of appeals warranting this Court's review. As this Court has repeatedly stated, it "reviews judgments, not statements in opinions." *E.g.*, *California* v. *Rooney*, 483 U.S. 307, 311 (1987) (per curiam); *Black* v. *Cutter Labs.*, 351 U.S. 292, 297 (1956); see also *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984); *Williams* v. *Norris*, 25 U.S. (12 Wheat.) 117, 120 (1827).[6]

Petitioners speculate (Pet. 15-18) that the differences in rationales among the courts of appeals may someday lead to different results concerning issues such as the applicable statute of limitations or whether prejudgment interest may be recovered.

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[5] Indeed, Congress consciously modeled CERCLA's contribution provisions on well established legal principles, including those embodied in the UCATA. See *United States* v. *Cannons Eng'g Corp.*, 720 F. Supp. 1027, 1048 (D. Mass. 1989), aff'd, 899 F.2d 79 (1st Cir. 1990).

[6] Petitioners note that one court of appeals has stated that a potentially responsible party may impose joint and several liability on other such parties if the former can show that it is, in fact, "blameless" for the pollution of the site. Pet. 18-20 (citing *Rumpke of Indiana, Inc.*, 107 F.3d at 1240). Petitioners, however, are concededly liable at the site in question here, and that distinction is not implicated in this case. See Pet. App. 14 n.5.

Those possibilities, however, are purely hypothetical matters that are not implicated here. This case was before the court of appeals on an interlocutory appeal of the denial of the respondents' motions for dismissal and judgment on the pleadings. Pet. App. 4-7. The court of appeals did not decide any of the speculative questions that petitioners posit, and this Court should not undertake to issue an advisory opinion on those matters.[7]

Petitioners and their amici, which include eleven States and seven cities, also urge that the question presented here is of exceptional importance warranting this Court's review because, in their view, a responsible party will not have sufficient incentive to engage in voluntary cleanup of a hazardous waste site if that party is limited to seeking contribution from other responsible parties. Pet. 27-30; Amici Br. 5. That policy perspective, however, is not necessarily shared by other States and cities. As we explain below, it is not shared by the United States. In light of the many significant issues presented to this Court, the question presented in this case is not sufficiently important to warrant the Court's review in the absence of a square conflict among the courts of appeals.

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[7] This Court has not addressed the specific question of whether a responsible party may sue another responsible party under CERCLA based on a theory of joint and several liability, rather than contribution. The Court has addressed, however, whether a private party may sue to recover attorney's fees as a "necessary cost[] of response" under Section 107(a)(4)(B). *Key Tronic Corp.* v. *United States*, 511 U.S. 809 (1994). As the court of appeals noted (Pet. App. 13), its decision is consistent with *Key Tronic*. We discuss the relevance of *Key Tronic* in greater detail below.

2. The United States submits that review is also not warranted because the court of appeals' decision is correct. Section 107(a)(4)(B) of CERCLA provides that a responsible private party shall be liable for "necessary costs of response incurred by any other person consistent with the national contingency plan." 42 U.S.C. 9607(a)(4)(B). Section 107(a)(4)(B)'s reference to "any other person" is broad enough to allow one jointly responsible party to sue another for the former's response costs. See *Key Tronic Corp.* v. *United States*, 511 U.S. 809, 818 (1994) (Section 107 "impliedly authorizes private parties to recover cleanup costs from other PRPs."). Section 107(a)(4)(B) does not describe, however, what form that liability should take. *Key Tronic*, 511 U.S. at 818 & n.11. Section 113 fills that void. When read in combination, the clear implication of Sections 107(a)(4)(B) and 113(f) is that the jointly responsible private party is limited to seeking contribution in accordance with Section 113(f).[8]

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[8] That construction is consistent with this Court's decision in *Key Tronic*. The specific issue in *Key Tronic* was whether a private party, which happened to be a responsible party, could recover attorney's fees under Section 107(a)(4)(B) as a "necessary" cost of response. 511 U.S. at 811. The Court ultimately ruled that Section 107(a)(4)(B) does not authorize recovery of attorney's fees associated with bringing a cost recovery action. *Id.* at 816-821. The *Key Tronic* decision describes the general contours of CERCLA liability, and it recognizes that a jointly responsible private party that incurs cleanup costs would have a right, as a general matter, to *contribution* from other responsible parties under Sections 107 and 113. *Id.* at 816. Although *Key Tronic* does not expressly preclude the assertion of other forms of liability, it does not suggest in any way that CERCLA allows a jointly responsible private party to assert

As the court of appeals recognized, an action by one jointly responsible party against another to recover the former's necessary costs of response under CERCLA is, in essence, an action to apportion their joint liability. Pet. App. 8. That action should take the traditional, familiar, and entirely "unremarkable" form of contribution, which Congress has expressly made available through Section 113(f). *Id.* at 8-9. As the court of appeals explained, "while § 107 created the right of contribution, the 'machinery' of § 113 governs and regulates such actions, providing the details and explicit recognition that were missing from the text of § 107." *Id.* at 9. See also, *e.g.*, *id.* at 11-12; *New Castle County*, 111 F.3d at 1120-1122; *Browning-Ferris*, 33 F.3d at 99-101.

The court of appeals' interpretation rests on a sensible construction of CERCLA's complementary provisions that fulfills the "classic judicial task" of reconciling several provisions of a statute enacted over time and "getting them to 'make sense' in combination." *United States* v. *Fausto*, 484 U.S. 439, 453 (1988). The court of appeals correctly recognized that Sections 107 and 113 "work together—the first section creating the claim for contribution between PRPs, and the second qualifying the nature of that claim." Pet. App. 9. That understanding is reflected in other provisions of CERCLA, such as Section 113(h)(1), which makes reference to "[a]n action under section [107] to recover response costs or damages *or for contribution*." 42 U.S.C. 9613(h)(1) (emphasis added). The court's interpretation is also consistent with the legislative history of Section 113(f), which

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a claim of joint and several liability against other jointly responsible parties.

indicates that "Congress was only confirming and clarifying an existing claim for contribution under § 107." Pet. App. 8 (citing H.R. Rep. No. 253, 99th Cong., 1st Sess., Pt. 3, at 18-19 (1985); S. Rep. No. 11, 99th Cong., 1st Sess. 43 (1985)); see also 131 Cong. Rec. 24,450 (1985)(statement of Sen. Stafford).

Petitioners dispute that interpretation and argue that Sections 107 and 113 should be viewed as creating independent remedies. They contend that a jointly responsible party that incurs response costs can simply invoke Section 107(a)(4)(B), without regard to Section 113(f), and sue some or all of the other responsible parties for the full amount of the cost of cleanup on the theory that the named defendants are subject to joint and several liability. In petitioners' view, the responsible party is entitled to avoid Section 113(f)'s provisions for allocating cleanup costs on an equitable basis through contribution from other responsible parties. See Pet. 10-12.

Petitioners' construction of CERCLA is unpersuasive because it rejects a straightforward and sensible interpretation in favor of an extraordinary construction that would reject familiar legal concepts and stultify CERCLA's contribution mechanism. As a general matter, we are aware of no precedent in the law for allowing a joint tortfeasor that has discharged some or all of its liability to sue another joint tortfeasor for joint and several liability. That approach would create an unworkable system of liability that would permit responsible parties to circumvent Section 113(f)'s mechanism for allocating response costs among jointly responsible parties "using such equitable factors as the court determines are appropriate." See 42 U.S.C. 9613(f)(1); Pet. App. 11-13. Indeed, petitioners seek to impose joint and several

liability on the other responsible parties precisely to avoid the equitable allocation that Congress provided for in Section 113(f). *Ibid.*

Petitioners repeatedly suggest (*e.g.*, Pet. 12, 13, 14, 21, 22, 23, 24, 25, 26, 27) that their construction is supported by the "plain language" of Section 107(a)(4)(B), but that refrain is simply not accurate. Petitioners assume that, because Section 107(a)(4)(B) provides a cause of action to "any other person" who has incurred response costs, those persons must necessarily have a cause of action for joint and several liability. That assumption, however, is unjustified. Section 107(a)(4)(B) does not state, or even suggest, that every person who has a cause of action is entitled to seek imposition of joint and several liability. Section 107(a)(4)(B)'s lack of specificity on the scope of a responsible party's rights should be resolved by reference to traditional legal principles, which instruct that the appropriate remedy for a jointly responsible party is the right of contribution set out in Section 113(f). See, *e.g.*, *County Line Investment Co.* v. *Tinney*, 933 F.2d 1508, 1515-1518 (10th Cir. 1991); cf. *Key Tronic*, 511 U.S. at 816.

Petitioners' construction not only lacks a foundation in the "plain language," but it would lead to incongruous results. If a jointly responsible party that has incurred response costs could impose joint and several liability on any other jointly responsible party, parties that have paid a CERCLA judgment or settled their liability would have a strong incentive to forgo CERCLA's contribution provisions and sue other responsible parties on a selective basis to recover the full amount of the judgment or settlement. The result would be a series of such suits, like this one, in which each party, or confederation of

parties, seeks to transfer its entire liability to another. "Such a joint and several approach would 'guarantee[] inefficiency, potential duplication, and prolongation of the litigation process in a CERCLA case.'" Pet. App. 13 (citing *T H Agriculture & Nutrition Co.* v. *Aceto Chem. Co.*, 884 F. Supp. 357, 361 (E.D. Cal. 1995)). See also, *e.g.*, *Town of New Windsor* v. *Tesa Tuck, Inc.*, 919 F. Supp. 662, 681 (S.D.N.Y. 1996); H.R. Rep. No. 253, 99th Cong., 1st Sess., Pt. 1, at 80 (1985).

Petitioners contend (Pet. 10-12) that this problem can be contained by allowing only parties "who conduct environmental cleanups" to pursue joint and several liability. Section 107(a)(4)(B) provides no textual basis, however, for drawing a distinction between "working PRPs" and other responsible parties. See Pet. App. 14-16; see also, *e.g.*, *Browning-Ferris*, 33 F.3d at 101-103. Petitioners base that distinction on their view that creating it would advance CERCLA's policy of promoting voluntary cleanups. See Pet. 27-30. The court of appeals correctly refused to draw a policy-based distinction that finds no support in "the controlling text, structure, and logic of CERCLA." Pet. App. 16. See generally *Central Bank of Denver, N.A.* v. *First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 186-189 (1994); *Pavelic & Le Flore* v. *Marvel Entertainment Group*, 493 U.S. 120, 126 (1989).

Furthermore, the court of appeals was properly skeptical of the contentions, pressed by petitioners and their amici, that its holding would discourage voluntary cleanups. Pet. App. 16. Responsible parties, like petitioners, that own or operate a contaminated site are likely to have substantial business and civic incentives to clean up the site. *Id.* at 16-17.

The right to contribution provides a strong additional incentive to engage in a voluntary cleanup. As the court of appeals recognized, the courts are authorized to take into account a responsible party's cooperation with cleanup efforts when equitably allocating liability among responsible parties under Section 113(f)(1). See *id.* at 16; see also, *e.g.*, *Stearns & Foster Bedding Co.* v. *Franklin Holding Corp.*, 947 F. Supp. 790, 801 (D.N.J. 1996).[9]

Although petitioners emphasize (Pet. 28) that CERCLA was intended to encourage private parties to perform cleanups, that was not Congress's sole policy goal. Congress also sought to encourage settlement, achieve an equitable allocation of response costs among all responsible parties, minimize litigation and other transaction costs, and ensure that polluters pay the costs of cleaning up the

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[9] Petitioners' amici, like petitioners themselves, argue that responsible parties will undertake voluntary cleanups only if they have the additional incentive of a right to assert claims for joint and several liability against other responsible parties. Amici Br. 5, 10-16. It is telling, however, that the amici States have not conferred any such authority in their own hazardous waste cleanup statutes. We have found no instance in which any of the amici States currently has a provision in its state superfund statute authorizing a liable party to impose joint and several liability on another liable party. Indeed, Arizona recently amended its state superfund statute—the Water Quality Assurance Revolving Fund—to eliminate joint and several liability claims by private parties and by the State. Liability under the Arizona statute is now several rather than joint and several. Ariz. Rev. Stat. § 49-285(A) (1997). Similarly, the other amici States that provide a private right of action appear to authorize only actions by private parties for contribution. *E.g.*, Ohio Rev. Code Ann. § 3746.23 (Anderson 1997); Ga. Code Ann. § 12-8-96.1 (1996).

hazardous conditions they create. See 42 U.S.C. 9613(f)(1) and (2); Pet. App. 12-13; *United States* v. *Cannons Eng'g Corp.*, 899 F.2d 79, 90-91 (1st Cir. 1990); *Dravo Corp.* v. *Zuber*, 804 F. Supp. 1182, 1185-1188 (D. Neb. 1992), aff'd, 13 F.3d 1222 (8th Cir. 1994).

Section 113(f)'s contribution provisions play an important role in achieving those goals. The contribution provisions allow the court to weigh all the equitable factors relevant to a fair allocation of response costs among responsible parties. A private party that incurs response costs receives fair treatment, because that party is entitled to recover amounts paid in excess of its equitably allocable share, including its costs of "work performed in identifying other PRPs." *Key Tronic*, 511 U.S. at 820. The contribution provisions also promote judicial economy and reduce transaction costs by providing a single centralized forum for conducting the allocation, which would not necessarily be available if every responsible party could sue another for full recovery on a theory of joint and several liability. See, *e.g.*, *Tesa Tuck*, 919 F. Supp. at 681.

3. This case presents an especially inappropriate occasion for this Court to address the question presented, because petitioners and the State of Arizona have submitted a proposed consent decree to the district court that, as a practical matter, would significantly alter the context in which this Court would decide the legal issues. As noted above, the proposed consent decree would resolve petitioners' CERCLA liability to the State of Arizona with respect to the Site and provide petitioners with protection from contribution suits by other liable parties, including respondents, for the State's CERCLA claims. See p. 5, *supra*; see generally 42 U.S.C. 9613(f)(2).

The consent decree's provision for contribution protection is significant because petitioners assure the Court in their petition that, under their construction of CERCLA's liability provisions, "a liable CERCLA defendant must pay all the plaintiff's response costs, but then may seek to recover a portion of them from others, including a liable plaintiff, by prosecuting contribution counterclaims, cross-claims, or third-party claims." Pet. 12. Petitioners' assurance is inconsistent, however, with the contribution protection provisions of the proposed consent decree, which purport to preclude respondents from asserting a contribution counterclaim.

It appears that, unless they intend to forgo their claim of joint and several liability, petitioners seek to have the best of both worlds. They want the right to assert a claim for the full amount of their response costs against other responsible parties and the simultaneous right to be immune from contribution. That combination of rights would entitle petitioners to avoid liability for any of the response costs for the Site, notwithstanding petitioners' substantial responsibility for the hazardous conditions at the Site. The result petitioners apparently hope to achieve illustrates in a concrete way why their construction of CERCLA's liability provisions is flawed. There is no reason to believe that Congress intended to promote that palpable inequity.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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